UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

NAVOPACHE ELECTRIC COOPERATIVE, INC.

and **Case No. 28-CA-160585**

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION NO. 387, AFL-CIO-CLC

CONSOLIDATED REPLY TO ANSWERING BRIEFS TO RESPONDENT'S STATEMENT OF EXCEPTIONS

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Respondent Navopache Electric Cooperative, Inc. ("Navopache," "Respondent," or the "Cooperative") submits the following Consolidated Reply to Counsel for the General Counsel's and Charging Party's Answering Briefs to Respondent's Statement of Exceptions:

PRELIMINARY STATEMENT

Counsel for the General Counsel ("CGC") and Charging Party ("CP") lack candor. The undisputed record discloses:

- The instant Policy prohibits employees from discussing personnel matters *only* during regular and special meetings of the Board of Directors (the "Board").
- Employees attend regular and special meetings *only* during the Board's 'call to members.'
- The call to members comprises employees' *working time* during which employees would otherwise be expected to perform job functions.

While CGC and CP must acknowledge these facts, they attempt to diminish their import. Regardless, the Policy *is* narrowly tailored, as it applies only for two hours once per month and supports legitimate business interests. Moreover, the Policy applies *only* during employees' and the Board's *working time* when Section 7 activities may be lawfully restricted.

Neither CGC nor CP elicited any evidence that employees lack meaningful opportunity to address the Board outside of its regular and special meetings. It is further undisputed that the Board's regular and special meetings occur during business hours and in work areas. If employees have a right under Section 7 to cease working to address the Board in its "official capacity," neither CGC nor CP cites any legal authority in support of such a contention. Moreover, if the Board cannot set aside time to address *only* the topic of Cooperative members' electrical service, neither CGC nor CP identifies when it may *actually* do so. These omissions reveal CGC's and CP's manifest misapprehension about the real world complexities associated

with the Policy and its impact on employees. There are certain times during which employers may restrict employees' Section 7 activities, for example, when employees are working or when management is unavailable to discuss personnel matters (when a supervisor is on the phone, has an impending deadline, or designates a meeting to discuss matters unrelated to personnel).

By way of analogy, do employees of the NLRB have plenary rights to cease working and attend Chairman Miscimarra's meetings to discuss personnel matters? Do employees of Ward, Keenan & Barrett have a right to interrupt its attorneys' meetings with opposing counsel to discuss personnel matters? Respondent respectfully submits that they do not. By way of further analogy, consider the following hypothetical work rule that mirrors the instant Policy:

> The Board of Directors of Microsoft shall conduct a monthly two-hour phone conference with members of the public to address issues relating to Microsoft products. Employees of Microsoft may also attend the phone conference, but they do not have access to the Board of Directors on personnel matters during this two-hour period. Most employees use Microsoft products. Should there be issues as a consumer, not related to personnel matters, then employees have the same access to visit with the Board of Directors as any member of the public.

Neither the hypothetical rule nor the Policy chills employees' Section 7 rights. While both expressly prohibit Section 7 activities, the prohibitions apply only in carefully defined circumstances.

I. The practical effect of the Decision works to the detriment of employees.

CGC's and CP's cursory responses to Navopache's legitimate and reasonable concerns about the practical effect of the Decision are troubling. It is not Respondent's position, as CP claims, that the recommended remedy "will bring an end to civilization as we know it." Brief of CP at 17. Also, CGC is wrong that "the recommended Order does not give ... employees the right to dictate the agendas of the Board" or "bar the Board of Directors from discussing member concerns about electrical services." Brief of CGC at 14-15. Of course it does. When an

employee *must* be heard on personnel matters during the call to members, he or she peremptorily commands the Board's agenda and precludes discussion about members' concerns with respect to their electrical service.

To make matters worse, the employees are not free to do this during what is undisputedly their working time. This is precisely why the practical effect of the recommended remedy is for the Board to simply exclude employees from the call to members altogether. There can be no doubt that, if the Union held a monthly meeting with its members to discuss Topic A, and the Union was forced to change the purpose of the meeting to discuss Topic A *and* B, the latter of which is not pertinent to the meeting, the Union would simply seek an alternative to address Topic A. Likewise, why would Navopache continue to hold its monthly call to members if it is forced to allow employees to cease working in order to address personnel matters?

II. The Policy is lawful on its face.

In determining whether a rule is unlawful on its face, the NLRB must give the rule a reasonable reading and refrain from reading particular phrases in isolation. *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 646 (2004). Paragraph 1 provides that supervisors and employees are present at Board meetings at the call of the Chief Executive Officer ("CEO"). Embedded in paragraph 1 is the notion that employees and supervisors are present at Board meetings – when the Board is 'in session' – to present reports to the Board in support of the Board's duties of governance, finance, and operations. Paragraph 2 provides that, when employees are present during regular or special meetings of the Board, they may not raise personnel matters. As record evidence shows, employees attend regular and special meetings *only* during the call to members, which the Board holds specifically to address members' concerns with their electrical service.

Paragraph 3 provides that employees have the same access to the Board as any member of the Cooperative on matters unrelated to personnel matters. That is, during the call to members, employees are free to discuss their electrical service with the Board as any other member of the Cooperative. The NLRB must reject CGC's and CP's attempts to read paragraph 3, which does not specifically mention meetings of the Board, in isolation of paragraphs 1 and 2, which specifically do. As Mr. Moore testified, the meaning of paragraph 3 makes clear that the restrictions in paragraph 2 apply when someone is wearing the 'dual hats' of member and employee during the Board's call to members. Tr. 127:24-129-22. Indeed, paragraph 3 is not a restriction but an enumeration of employees' rights to lodge a complaint at the call to members, so long as it does not involve a personnel issue. When viewed in context of the overall rule, paragraph 3 does not and cannot be read to prohibit employees from addressing personnel matters with the Board *at all times*.

III. The context of the Policy and its actual impact on employees is paramount.

CGC and CP argue that employees' subjective interpretation of the Policy and the context in which the Policy applies are not relevant. Nothing could be further from the truth: "[A]n otherwise unlawful ... rule will be found lawful if, when viewed in context, employees would not reasonably understand the rule to prohibit Section 7 protected activity." Office of General Counsel Memorandum 15-04 at 4 (March 18, 2015); *Adtranz ABB Daimler-Benz Transp., N.A. v. NLRB*, 253 F.3d 19, 28 (D.C. Cir. 2001) (the NLRB must "consider the context in which the rule was applied and its actual impact on employees"). Here, the Policy cannot be read in a vacuum. Without some considerations of the context of the Policy, how else would employees (or the NLRB) understand the meaning of "regular or special meetings" or regulation of employees' conduct as employees *and* members?

The Policy has been in effect for *more than 22 years*. G.C. Ex. 2. During that time, employees have attended meetings of the Board to discuss their electrical service and they have discussed personnel matters with members of the Board outside of such meetings. No employee came forward to testify that he or she had ever been deterred from discussing personnel matters with the Board or any member of the Board. Indeed, the interests underlying the Policy are multiple and undisputed, and these interests are understood by employees and members of the Cooperative as part of its regular practice. The Policy would only cause employees to reasonably construe the Policy as an attempt to control the content of the Board's meetings, especially with respect to its limited time and resources to conduct its own business. The NLRB must give *some* consideration to the "real-world 'complexities'" associated with the Policy. *William Beaumont Hosp.*, 363 NLRB No. 162, *41 (Apr. 13, 2016) (Miscimarra, dissenting in part).

IV. The cases on which CGC and CP rely are inapplicable.

CGC's and CP's reliance on *American Federation of Teachers N.M.*, 360 NLRB No. 59 (2014) ("*Federation*"), and *Michigan State Employees Ass'n*, 364 NLRB No. 65 (2016) ("*Michigan State*"), and CP's reliance on *Hyundai American Shipping Agency*, 357 NLRB 860 (2011) ("*Hyundai*"), is mistaken. The work rules at issue in those cases were *very* different than the Policy in the instant matter.

Federation involved a rule that prohibited employees from "lobbying" the employer's executive counsel "on any items that are likely to come before [the executive council] to be voted on including personnel matters." 360 NLRB at *26. The rule in that case was overly broad because the time and place restriction on communicating with the executive council regarding personnel matters was *unlimited in scope*. Unlike the rule in *Federation*, the Policy prohibits

employees from discussing personnel matters only *for two hours once per month during employees' working time*.

Hyundai involved a rule that required employees to complain only to immediate supervisors or to human resources. *Hyundai*, 357 NLRB at 860. The NLRB held that the rule was unlawful, however, the United States Court of Appeals for the District of Columbia Circuit reversed the decision. The Court of Appeals emphasized that the rule was neither mandatory nor preclusive of alternatives, and it did not prescribe penalties for making complaints to fellow employees or outside the chain of command. Similarly, the Policy does not require employees to direct complaints to *anyone*. Employees are free to direct complaints to their co-workers, supervisors, department managers or the Board, so long as the Board is not conducting regular or special meetings (which occur during working time).

Finally, *Michigan State* involved a rule that directed all complaints to the president of the company. The rule further prohibited employees from making complaints to the company's governing board. The NLRB concluded the rule in *Michigan State* was unlawful because it conveyed the message that employees must address personnel concerns with only a single member of management. Again, unlike the rule in *Michigan State*, the instant Policy does not require employees to direct complaints to anyone, nor does it preclude employees from complaining to co-workers, supervisors, department managers, or the Board (except during the call to members). Indeed, both CGC and CP acknowledge that Navopache relies on the CEO, his delegates, and multiple department managers to manage labor and personnel issues.

In short, the cases to which CGC and CP cite are inapplicable because the Policy presents a reasonable and lawful working time restriction on employee conduct, not an unreasonable, unlimited restriction.

V. The Board has repeatedly recognized that employers may prohibit Section 7 activities during working time and in work areas.

The Policy presents a very limited context in which employees are prohibited from discussing personnel matters – at regular or special meetings of the Board. During a couple of hours on a monthly basis (during regular business hours), any member of the Cooperative who wants to address the Board may do so, but the member may not address personnel matters at that time. The call to members, instead, is reserved for members to address, for example, power outages, pricing, rates, or other member issues. Other than regular or special meetings of the Board, however, the Policy does not limit, restrict, or prevent employees' access to Board members. Furthermore, despite CGC's and CP's conclusory statements otherwise, employees, in fact, have ample opportunity to address personnel issues with the Board outside of regular and special meetings, and record evidence shows that Board members regularly meet with represented and non-represented employees in a variety of settings.

The Board's regular and special meetings comprise both employees and the Board's working time. CGC states this position borders on "absurdity," while CP calls it "frivolous." They fail to fully grasp this issue because they seize upon (and unnecessarily restrict themselves to) the notion that the Board's meetings comprise only the *Board's* working time. First of all, the meetings occur during employees' working time. Additionally, working time is not a one-way street. *Purple Communs., Inc.*, 361 NLRB No. 126, *87 (Dec. 11, 2014) (Miscimarra, dissenting) (the prohibition applies whether or not the employee is doing the soliciting or being solicited). Working time restrictions may apply to those engaged in Section 7 activities, as well as to those who are the intended recipient of the message protected by Section 7. What else is a

meeting of the Board but *working time* during which Navopache may lawfully restrict Section 7 activities?

Indeed, CGC and CP fail to identify how the Board's regular and special meetings are *non-working time*. The Board's regular and special meetings occur during regular business hours and in the Cooperative's work areas. The Policy allows the Board to conduct its business effectively and efficiently, namely, to carry out the Board's duties of governance, finances, operations, and securing affordable prices and reliable energy. Do CGC and CP contend that the right of employees to address the Board on member issues during this two-hour period converts the time to non-working time? In any event, it is patently unreasonable that a supervisor's working time – meeting impending deadlines, taking phone calls, directing meetings on a specific topic unrelated to personnel matters – must always surrender to employees' personnel concerns. The NLRB must not allow the Union to convert working time into something less – simply to facilitate an argument that the Policy is overbroad.

VI. Personnel matters are properly directed to the Cooperative's bargaining representative.

CGC and CP fail to identify the fundamental reason that employees *must have access* to the Board during the call to members on personnel issues. Why must employees address the Board on personnel matters during regular and special meetings? There have been no allegations that the bargaining representative has somehow stonewalled grievance processing or bargaining in general. This truly underscores what the Union is attempting to do here, which is to bypass Navopache's designated bargaining representative and the grievance and arbitration process. What the Union is attempting to do here runs directly counter to the Cooperative's determination

to designate the CEO as the bargaining representative in labor relations and Section (b)(1)(B) of the Act.

VII. CGC and CP failed to produce any witness to corroborate its theory of the case.

CGC's and CP's pronouncements about the facts in this case are truly disingenuous, given that neither party presented any employee's testimony corroborating their theory of the case. When a party "fails to call a witness who may reasonably be assumed to be favorably disposed to the party, an adverse inference may be drawn regarding any factual question on which the witness is likely to have knowledge." *Daily Grill & Unite Here, Local 11*, 364 NLRB No. 36, *51 (June 20, 2016). Here, CGC and CP failed to produce any witness to testify about the facts on which their Answers purport to rely. How can CP claim that employees lack meaningful opportunity to address the Board, when neither CGC nor CP presented testimony regarding such facts? How can CP claim that it filed the instant Charge "[u]pon learning" about the Policy, when the testimony shows that the Union knew and understood Navopache's position with respect to the Policy since at least 2012? In short, the ALJ had no basis to discount or dismiss Respondent's evidence and should have concluded that there was no evidence to support the finding of a violation of Section 8(a)(1) of the Act. In light of the overwhelming amount of uncontroverted testimony and CGC's and CP's failure to call any witness to corroborate their version of events, the ALJ should have drawn an adverse inference supporting the testimony of Mr. Moore and Ms. Stobs.

VIII. This matter is appropriate for deferral to the parties' grievance and arbitration procedure.

CGC and CP barely attempt to defend the ALJ's reasons for concluding that deferral was not appropriate. Instead, CGC and CP pivot to argue that deferral is not appropriate because this

dispute involves a statutory claim. This misstates the law. The Board has consistently deferred statutory claims to arbitration. *See Berklee Coll. of Music*, 362 NLRB No. 178, n. 1 (Aug. 26, 2015) ("[w]hen a party's action presents questions about both the interpretation of a CBA and legal obligations under the Act, the Board will frequently defer to the arbitration procedures contained in the parties' CBA"). Courts have long held that the NLRB has no role to play when the contractual and unfair labor practice issues overlap. *See, e.g., Am. Freight Sys., Inc. v. NLRB*, 722 F.2d 828, 831 (D.C. Cir. 1983). Here, the Policy implicates a purported statutory right indistinguishable from rights under the CBA.

Article VII of the CBA broadly defines "grievance" as "any complaint on the part of an employee or employees regarding … dissatisfaction with working conditions or any action on the part of the Cooperative which is believed to be in violation of the Agreement." R. Ex. 4. Indeed, an arbitrator could properly and fully consider the issues and remedy any alleged breach of the CBA and violation of the Act. Even if the ALJ did not believe the Charge was covered by Article VII of the CBA, an arbitrator is in the best position to evaluate the parties' contractual intent. It would be inconsistent with federal labor policy to allow the Union to unilaterally impose terms on Respondent and dictate that employees may address personnel issues and employment grievances at special and regular meetings of the Board. The NLRB, therefore, must defer this matter to arbitration, so that an arbitrator may exercise appropriate jurisdiction to interpret the CBA consistent with the parties' intent and federal labor policy.

IX. Conclusion.

The Policy does not chill employees' exercise of their Section 7 rights. The NLRB should reverse the Decision and dismiss the Complaint in its entirety or, in the alternative, defer this matter to the parties' grievance and arbitration process.

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CERTIFICATE OF SERVICE

I hereby certify that on April 17, 2017, a true and correct copy of the foregoing was sent in the manner indicated below to the following:

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